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PREFACE:

SOME IDEALS FOR LAWYERS

Chief Justice Edward F. Hennessey
Supreme Judicial Court of Massachusetts

When your editors asked me to write this preface, they suggested that I might present an overview of the Supreme Judicial Court's work during the 1975-1976 court year. I know from past experience of the extraordinary overview that is presented in these volumes by your editors; they need little help of that kind from me. For that reason I turned to their alternative suggestion: my thoughts as to the role lawyers should play in improving the quality of American justice. Obedient to that theme, I suggest some ideals for our profession, ideals of special service to the cause of improving the quality of justice.

In beginning this theme, my first thoughts are of lawyers and corruption. Corruption concerning lawyers in the highest places, in government and in giant corporations. Corruption which is anything but subtle. Corruption in the form of bribery, larceny and in the criminal violation of individual rights. I refuse to accept the popular canard that lawyers are more likely to be corrupt than other persons. On the contrary, I make an educated guess that the mine-run of lawyers, in this profession which has of all professions the maximum of temptation and opportunity for wrongdoing, is probably a cut above the average in morality. Nevertheless, I recognize that the special privileges which inhere in the lawyer's license to practice are accompanied by a special duty of self-policing.

How may we serve? I suggest the first answer. Wherever we practice law we should support a vigorous bar-discipline structure; financed, not by the taxpayers, but by assessment upon the bar. The structure will be readily accessible to the public, and may include laymen as well as lawyers. It will require constant vigilance lest it become moribund. It will, aggressively and without partiality, identify and curb the incompetents and the charlatans of the profession. We should also recognize a special duty to support a judicial-discipline structure that will aggressively pursue public complaints of venality upon the bench. But it will go farther, and reach such things as judicial incivility and sloth, if any exists. And in all these things, we should not tolerate in ourselves or other attorneys a conspiracy of silence at the bar, out of false loyalty to any who have themselves been disloyal to their oaths.

Next, we would do well to consider the widespread abuse of the adversary process. How may we serve well in joining a profession in which some members are said to make litigation an end in itself? The lawyer's most malignant fault is what Chief Justice Burger has called contentiousness. Judge Learned Hand said, "I must say that, as a litigant, I should dread a law suit beyond almost anything else short of sickness and death." Attorneys in large numbers seem more interested in the complexity and prolongation of the dispute than in its resolution, and all to the great profit of the advocates.

The courts become clogged partly because of the overreaching of counsel, as they spin out their causes. The "simplified" rules of civil procedure, now almost universally applied in all American courts, are abused beyond the predictions of even their most pessimistic critics. The rules of discovery, by means of endless depositions and interrogatories, produce mountains of interlocutory product. Small wonder that, despite little access to backlogged and jammed jury sessions, the attorneys of the firms' litigation departments may whistle at their work.

I listen with respect, and some dismay, to those who say that the greatest abuse of the system occurs in those most complex of cases: antitrust suits and class actions. More than 5,000 class actions are now pending in the federal courts, and the gates are similarly beginning to open wide in the state courts. Interlocutory proceedings are abusively accumulated. We know, of course, that consumer class actions may be brought by the attorney general of a state, but they are more likely to be brought by private counsel, bringing suit for all affected consumers, known and unknown to counsel. And, knowing something of human nature, we recognize that it is true that many consumer class actions and antitrust suits are not meritorious; that some are instituted to wring settlements from corporations under threat of long and incredibly expensive litigation; that the recovered amounts due to the consumers go unclaimed in large percentages, and escheat to the state; that the most certain element of all is that large attorneys' fees are involved.

Nevertheless, we are disturbed that the Supreme Court, probably induced by the massive flood of litigation which threatens to inundate the court system, has with recent decisions restricted citizen access to the courts and made citizen suits even more financially difficult.

Some of us are disturbed because we believe that state and federal administrative regulation of corporations has long since demonstrated its limitations. Criminal and civil procedures by the government, aimed at control of corporate conduct, seldom enough seem to be brought or to come to fruition. Thus, in our complex society the class action is one of the few legal remedies for the lowly. We decide that since the courts apparently are too far committed to the ending of such proceedings, then recourse to the Congress and state legislatures is indicated. At the same time, in a flash of clear vision, we recognize

that one of the threats to the future of successful and continued citizen action in the courts may be the greed, unfairness and poor judgment of some attorneys for the citizens. The citizens' problems, caused by corporations running out of control, may be exacerbated by attorneys also running unchecked.

And so we may decide that we may serve well in our use of the courts, and in our refusal to abuse the processes of the law. We can apply moral judgment to assure that litigation without merit is not pursued or furthered by us; that we do not feed and prey upon congestion and delay in the courts, thereby compounding a festering social evil. We can assure that the worthless suit does not acquire a value by the process of prolonged and expensive litigation, which in turn may be converted into substantial attorneys' fees, and settlements achieved solely by the harassment of litigation. Additionally, we can despise Dickens' rule of *Jarndyce v. Jarndyce*, which has nurtured so much distrust for our profession. We can aim at just and prompt resolution of disputes, wherever possible, rather than to adopt extended contention as a profitable end in itself. In this way we can assure that the courts are not further clogged by any abuses fostered by us and that the forum to that extent may be more readily available to the deserving litigant. We can do all within our power to make the courts more rather than less accessible to the underprivileged through public and private litigation.

In the same spirit, if we are legal advisors to corporations we can do what we can to bring moral and ethical principles to bear upon their business practices, to the end that justice will be assured without the need for litigation.

But these resolutions, valid as they are, may lead us to more troublesome considerations. For we know that few citizens have access to the legal system, whether to defend their constitutional and statutory rights or to advance their causes. Legislative and administrative forums, as well as the courts, are available to very few on issues of housing, health care, taxes, government devices, occupational and environmental disease, corporate abuses and the legal industry itself. Where government neglect exists, individual initiative is needed, but is wanting. Funding, public and private, for public interest law programs has been grossly inadequate, and uncertain in duration, and at times has been used to promote the causes of lawyers rather than the disposition of cases. And so we may recognize and support the need for the award of attorneys' fees (presently denied) for private litigants whose lawsuits confer substantial public benefits. At the same time we recognize the danger of abuses of such a system, abuses we have already mentioned as related to class actions.

But in terms of any personal commitment to our professional obligations, the assurance of public support for the representation of citizens is welcome but not entirely relevant. Listen to the challenge of Professor Llewellyn delivered in 1933: "For the men of law are a

monopoly, and monopoly is subject to regulation. The ground for monopoly is that it makes possible better service; this holds of the bar. The condition of monopoly is that it serve; this does *not* hold of the bar. If it were gas or transportation these men of law were furnishing, the established policy and rule would be service to all comers on demand and no refusal, at fixed and reasonable rates, by State compulsion. The bar, man by man or firm by firm, set their own fees, choose among clients, and leave the bulk of needed service unperformed—the poor man's case. The bar purport moreover to exist as a profession. A profession is a line of work in which, so long as he who professes it can eat, his job is service. Law is a profession in theory, and a monopoly in fact; a monopoly not merely by force of skill and brain but established and maintained by law. Only through lawyers can the layman win in fact the rights the law purports to give him."

Consider the noble phrase "pro bono publico" (for the common good)! As we read Llewellyn's words, we know (more than forty years later) that almost all of the representation of indigents accused of crime is funded by the taxpayer, and that "pro bono" legal services in both criminal and noncriminal litigation are virtually nonexistent. For instance, we learn that only a few law firms in the great legal centers of America regularly provide any pro bono lawyer-hours. We learn, also, that young and outstanding lawyers applying to these firms have, perhaps because of overcrowding in the job market, ceased even inquiring if the hiring firm provides pro bono service to the community.

How can we serve? We may have reached one more compelling answer to our inquiry. To the extent that we, our firm, or our bar association can fairly be expected to do so, we should provide pro bono publico programs—those programs which are shamefully nonexistent today.

Closely related is the privilege of the lawyer and his bar associations to educate the public (in the schools and wherever else the public will listen) as to the operation of our courts, particularly as to constitutional rights.

In a very few years we have reached new heights in the protection of constitutional rights in our criminal courts. But now also there is a great sense of apprehension and foreboding among many people, largely because of the frightening increase in crimes of violence. Widespread distrust of the courts in their administration of criminal justice is expressed. As a result, there is a clear danger that there will be inroads and abridgements of our right of free speech and assembly, of our right to be free from unreasonable search and seizure, of our privilege against self-incrimination, our right to counsel and our right to the equal protection of the laws and to due process of law in all its forms. This may happen by federal and state legislation within constitutional limits, or even by constitutional amendments. The more likely possibility is that it may happen on a case-by-case basis by many,

many decisions, not only in Washington but in the municipal and county courthouses of the nation. The local court has no power to change the rule of constitutional law but we cannot ignore the fact that the trial judge makes the subsidiary findings which, in many or perhaps most cases, are determinative of the result on the constitutional issue.

Next we turn to perhaps the most subtle consideration of all: that of the influence of the lawyer and his bar associations in political policy. Strangely, by far the greatest force by lawyers in this direction is through the *judicial* process. What I speak of is the phenomenon which sees many courts in our country exercising control in a manner usually reserved to the executive and legislative branches. This has occurred because, as the constitutional or statutory rights of the individual against his government are more and more clearly defined, it is more and more frequently demonstrated that citizens are being denied their statutory or constitutional rights by government.

What are some of the results when a citizen can show a court that he is not receiving his true entitlement from the executive or legislative branches? It can result in a judge making the decisions that ordinarily a president, a governor, the Congress or the state legislatures would make—including decisions as to the expenditure of public funds, and the day-to-day operations of public agencies or institutions. The courts may make these rulings as to prisons, hospitals, civil service, mental institutions, welfare funds, or a multitude of other governmental functions. It follows that the courts are making orders as to the use of part of the public purse without regard to the whole of the public purse or other competing public obligations. They are allocating part of the public funds with no duty or knowledge as to the demands upon the total funds. This, in the interest of orderly government, is not good business if long continued.

It has been said that the effect of judicial assumption of these responsibilities can be that the legislature and the executive will refrain from serious discussion and decisive action with the political risk-taking which responsibility imposes. When the decisions are difficult, there is always the temptation to avoid confronting them, to let that responsibility pass to others. Even where there is the possibility for legislative and executive resolve, the freezing effect of the constitutional rule imposed by the courts may frustrate an effective response by these institutions. The most important consequence of all of continued judicial intrusion, necessary though it may be, is best stated by asking this question: if such a trend continues and increases, what is the effect upon our democratic and constitutional processes?

The process, of course, calls for judicial restraint; the judge should act in such matters only in cases of clear necessity. But I know of no judge, federal or state, who gladly or hastily exerts himself in what is ordinarily legislative or executive functions; nevertheless, he has no choice when the citizen's constitutional or statutory rights are ne-

glected by the government, and when relief can be afforded only by court order and court supervision. The greater part of the solution lies in more vigilant attention by the legislative and executive branches to the constitutional and statutory rights of all persons. In this process of vigilance an informed citizenry may have a controlling influence. It is easy to bring to mind examples from several states where public outcry brought about reform of prisons and other institutions.

The opportunity and duty of the bar is obvious: to influence legislative and executive departments toward the full performance of their duties. But the voice of the lawyer is a weak one in political matters. It was not always that way. In 1830, de Toqueville said of the American lawyer: "As the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies and are at the head of the administration. They consequently exercise a powerful influence upon the formation of the law and upon its execution." And in 1845 Rufus Choate, the advocate, added these words, "It has been the office of the American lawyers of my day to interpret, administer and maintain the constitutions of the country. They thereby 'shared in the dignity of founders of states, of restorers of states, of preservers of states. Because we are lawyers, we are statesmen. We are by profession statesmen. And who may measure the value of this department of public duty?'"

Not a word of de Toqueville's or Choate's appraisals hold true today! Less than a century after de Toqueville spoke, Justice Brandeis identified the political default of the bar in these words: "It is true that at the present time the lawyer does not hold that position with the people that he held fifty years ago, but the reason is not, in my opinion, lack of opportunity. It is because, instead of holding a position of independence between the wealthy and the people, prepared to curb the excesses of either, the able lawyers have to a great extent allowed themselves to become an adjunct of the great corporations and have neglected their obligations to use their powers for the protection of the people."

The default is even more clearly defined today. In the last two decades, the number of lawyer legislators has declined by about a third in the state legislatures. The bar is barely heard as to constitutional problems of the cities; not even heard as to a matter like prison reform, which of all things might seem to be a special concern of lawyers.

And so we identify another way to serve. We know that big government, like big business, at times and places is running out of control. The rights of individuals may be protected by petition to the judiciary, if necessary, but the country will be better served by political activism, of a kind now widely neglected among lawyers. Activism in the legislature, as legislative counsel, as counsel in executive departments of government, or more likely as participant in political ac-

tion groups. Only in that way can social necessity and the democratic process both be permanently well served. I suggest that anarchy and revolution are the product—in places such as Beirut and Belfast—of two things: long-standing injustice to many people and an absence of articulate, morally upright leadership. In training and in powers of persuasion, and hopefully in moral principles, the lawyer is especially suited for such leadership. The critical question is whether, in significant numbers, lawyers are willing to yield their role as prosperous spectators, as accused by Brandeis and Llewellyn. In particular, the question is urgent as related to the resurgence of racial confrontation in the nation.

Finally, I should like to bring these comments into perspective by observing that there is a large measure of idealism in a great number of America's lawyers. The noble attributes that I have listed are proof of this; they present themselves to me because I have seen many judges and lawyers work unselfishly in these directions. It is their ideals of service which we must propagate.

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